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2011

# State of Utah v. Allen Lee Dakin : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

STATE OF UTAH

Plaintiff/Appellee

Vs.

ALLEN LEE DAKIN

Defendant/Appellant

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Case No. 20110583

Appellate Brief

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**BRIEF OF APPELLANT**

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DEFENDANT'S APPEAL OF THE JUDGMENT ENTERED JUNE 28, 2011, IN THE FIRST DISTRICT COURT OF CACHE COUNTY, UTAH THE HONORABLE KEVIN ALLEN, PRESIDING.

DEFENDANT IS CURRENTLY INCARCERATED IN THE UTAH STATE PRISON.

---

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Attorney for Appellee**

## IN THE UTAH COURT OF APPEALS

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STATE OF UTAH

Plaintiff/Appellee

Vs.

ALLEN LEE DAKIN

Defendant/Appellant

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## Table of Contents

|   |     |
|---|-----|
| TABLE OF AUTHORITIES .....  | ii  |
| JURISDICTIONAL AND NATURE OF PROCEEDINGS .....  | 1   |
| CONSTITUTIONAL OR STATUTORY PROVISIONS .....  | 2,3 |
| STATEMENT OF THE CASE .....   | 3   |
| STATEMENT OF FACTS .....  | 3,4 |
| SUMMARY OF ARGUMENT.....  | 4   |
| ARGUMENT.....   | 4-6 |
| I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN<br>IT SENTENCED THE DEFENDANT TO PRISON |     |
| CONCLUSION .....  | 7   |
| ADDENDUM A  |     |

## TABLE OF AUTHORITIES

### UTAH STATE CASES

|   |       |
|---|-------|
| Anders v. California, 386 U.S. 738 (1967) .....               | 3,4,6 |
| State v. Baker, 963 P.2d 801 (Utah Ct. App. 1998).....        | 5     |
| State v. Chapoose, 985 P.2d 915 (Utah 1999) .....             | 4     |
| State v. Clayton, 639 P.2d 168 (Utah 1981).....               | 4,6   |
| State v. Houk, 906 P.2d 907, 909 (Utah Ct. App. 1999).....    | 4,5   |
| State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990) .....       | 5     |
| State v. Nuttall, 861 P.2d 454, 456 (Utah Ct. App. 1993)..... | 5     |
| State v. Reyes, 40 P.3d 630 (Utah 2002).....                  | 6     |
| State v. Rhodes 818 P.2d 1051 (Utah Ct. App. 1991).....       | 5     |
| State v. Sibert, 310 P.2d 388, 393 (1957).....                | 5     |

### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

|   |     |
|---|-----|
| Utah Code Ann. Section 78-2a-3(2)(e)..... | 1,3 |
| Utah Code Ann. Section 77-13-6.....       | 2,6 |

## IN THE UTAH COURT OF APPEALS

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|                      |   |                                   |
|----------------------|---|-----------------------------------|
| STATE OF UTAH,       | : |                                   |
| Plaintiff/Appellee,  | : |                                   |
| vs.                  | : |                                   |
| ALLEN L. DAKIN,      | : | District Court Case No. 111100138 |
| Defendant/Appellant. | : | Appellate Court No. 20110583      |

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### *BRIEF OF APPELLANT*

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#### JURISDICTION AND NATURE OF PROCEEDINGS

The Appellant is appealing from a Judgment, Sentence and Commitment in the First District Court for Cache County, Utah, dated June 28, 2011. The Defendant pled guilty to Aggravated Sexual Abuse of a Child, a First degree felony.. He was sentenced to serve a term of fifteen years to life at the Utah State Prison. He did not file a motion to withdraw his guilty appeal. Jurisdiction for the Appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. §78-2a-3(2)(e).

## ISSUE ON APPEAL AND STANDARD OF REVIEW

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT SENTENCED THE DEFENDANT TO PRISON?

*Standard of Review:* The Court must determine whether the trial court abused its discretion when it sentenced the Defendant to prison. “A sentence will not be overturned on appeal unless the trial court has abused its discretion, failed to consider all legally relevant factors, or imposed a sentence that exceeds legally prescribed limits.” *State v. Nuttall*, 861 P.2d 454, 456 (Utah Ct. App. 1993)..

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

### UTAH CODE ANNOTATED

#### § 77-13-6. Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

### **§78-2a-3(2)(e) Court of Appeals jurisdiction**

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

### **STATEMENT OF THE CASE**

The Defendant was charged with two counts of Rape of a child First degree felonies and two counts of Aggravated Sexual abuse of a child, First degree felonies (R. 001). Through plea negotiations, the Defendant pled guilty to count two of the information, Aggravated Sexual abuse of a child, a first degree felony. (R. 87). Defendant was represented by attorney Bryan P. Galloway. The Defendant was sentenced on June 28, 2011. He was sentenced to serve a term of fifteen years to life at the Utah State Prison. (R. 123). The Defendant did not file a motion to withdraw his plea prior to sentencing. A notice of appeal was filed on June 29, 2011. (R. 125).

Defendant's appellate counsel has carefully reviewed the record and has found no non-frivolous issues to appeal and is filing this brief in accordance with *Anders v. California*, 386 U.S. 738 (1967).

### **STATEMENT OF THE FACTS**



The Defendant pled guilty to Aggravated Sexual Abuse of a Child, a first degree felony. On June 28, 2011, he was sentenced to prison for fifteen years to life (R. 123).

The Defendant pled guilty as part of a plea bargain and did not file a motion to withdraw his guilty plea. His basis for wanting to appeal is he believes that his attorney was ineffective in advising him to accept the plea bargain and plead guilty.

### **SUMMARY OF ARGUMENTS**

Defendant's appellate counsel has diligently reviewed and researched this case and has found no non-frivolous issues to appeal. Defendant did not file a motion to withdraw his guilty plea and is therefore precluded from challenging the plea on appeal. In addition, he was sentenced to serve a term of fifteen years to life at the Utah State Prison. This is a legal sentence and is within the statutory guidelines for a first degree felony. For these reasons, counsel is filing this brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clayton*, 639 P.2d 168 (Utah 1981).

### **ARGUMENT**

The sentencing decision of a trial court is reviewed for an abuse of discretion. *State v. Houk*, 906 P.2d 907, 909 (Utah Ct. App. 1999)(per

curium). This includes the decision to grant or deny probation. *See, State v. Chapoose*, 985 P.2d 915 (Utah 1999). An abuse of discretion occurs when “the judge fails to consider all legally relevant factors or if the sentence imposed is clearly excessive.” *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990)(citations and quotations omitted). Furthermore, an appellate court can only find an abuse of discretion “if it can be said that no reasonable [person] would take the view adopted by the trial court.” *State v. Houk*, 906 P.2d at 909 (alteration in original)(quotations omitted).

In *State v. Baker*, 963 P.2d 801, 810 (Utah Ct. App. 1998), this Court stated that “[a]n abuse of discretion may be manifest if the actions of the judge in sentencing were ‘inherently unfair’ or the judge imposed a ‘clearly excessive’ sentence.” (citations omitted). In *State v. Rhodes*, 818 P.2d 1048 (Utah Ct. App. 1991), this Court stated that “[t]he trial court has broad discretion in imposing sentence within the statutory scope provided by the legislature.” *Id.* at 1051.

Both this Court and the Utah Supreme Court have held in the past that probation is not a right. *See, State v. Sibert*, 310 P.2d 388, 393 (1957). In *State v. Rhodes*, this Court stated that “[t]he defendant is not entitled to probation, but rather the court is empowered to place the defendant on probation if it thinks that will best serve the ends of justice and is compatible

with the public interest.” *State v. Rhodes*, 818 P.2d at 1051. This court also held that rehabilitation is not the only factor that a trial Court may consider when it makes a sentencing decision. “Other factors include deterrence, punishment, restitution, and incapacitation.” *Id.*

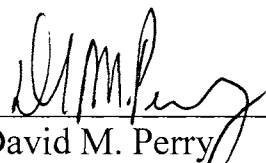
Furthermore, the Defendant didn’t file a motion to withdraw his plea and has not preserved any issues for appeal. Because the Defendant did not make a timely motion to withdraw his plea he is precluded from challenging his plea on appeal. *See, State v. Reyes*, 40 P.3d 630 (Utah 2002)(holding that failure to file a motion to withdraw a guilty plea “extinguishes a defendant’s right to challenge the validity of the guilty plea on appeal.”) Utah Code Annotated Section 77-13-6 requires a defendant to move to withdraw his plea prior to the time of sentencing.

Counsel has diligently researched the applicable statutory and case law and has been unable to find any law to support the Defendant’s position. Counsel has complied with the requirements set forth in *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Defendant was mailed a copy of this brief thirty days ago and has not responded to it. (See Addendum A, letter to Defendant/Appellant dated May 22, 2012). For these reasons, counsel respectfully requests permission to withdraw from further representation of the Defendant.

## CONCLUSION


Counsel is unable to find any non-frivolous issues to appeal. For this reason, counsel respectfully requests this Court to release him as appellate counsel.

DATED this 25 day of June 2012.

  
\_\_\_\_\_  
David M. Perry  
Attorney for Appellant

## CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtleff, Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 25 day of June 2012.

  
\_\_\_\_\_  
Joseph Burt  
Legal Assistant

**Certificate of Compliance**

I certify that this brief contains 1,324 words and is typed in 14-point Times New Roman font.

A handwritten signature in black ink, appearing to read "Joseph Burt", is written over a horizontal line.

Joseph Burt  
Legal Assistant

## **ADDENDUM A**

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LAW OFFICE OF

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PERRY, MALMBERG & PERRY

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L. TOM PERRY [1885-1966]  
TED S. PERRY [RETIRED]

May 22, 2012

Allen Dakin  
Utah State Prison  
Gunnison, Utah  
Inmate number

Dear Mr. Dakin:

Mr. Galloway filed a notice of appeal in your case and it appears you filed one also. I was appointed to see if there were any issues for appeal. In reviewing your case, I do not see any non-frivolous issues to appeal.

You entered a guilty plea to a first degree felony. You were told the potential maximum punishment you could receive. You did not file a motion to withdraw your plea prior to sentencing. When you plead guilty you waived the right to appeal the substance of the case. The only issue you could appeal is the sentence. In order to be successful in appealing the sentence you must show that the Court either imposed an illegal sentence, didn't consider all the legally relevant factors or abused its discretion.

In reviewing your case, it is clear the court imposed a legal sentence. The court considered all legally relevant factors and did not abuse its discretion when it imposed the sentence of fifteen years to life.

Because you do not have any appealable issue, I will file an appellate brief which informs the Court there are no non-frivolous issues to appeal.

Please inform me before June 22, 2012 if you have a different opinion.

Sincerely,

DAVID M. PERRY  
Attorney-at-law